

Itramas Technology Sdn Bhd v Maju Holdings Sdn Bhd & Ors

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT
NO WA-22NCC-245-06 OF 2020

WAN MUHAMMAD AMIN JC

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9 JULY 2021

Civil Procedure — Striking out — Application for — First defendant applied to strike out plaintiff's claim — Whether there was obligation under agreement for first defendant to pay plaintiff — Whether corporate veil of second defendant ought to be lifted — Whether plaintiff's claim against first defendant was frivolous, vexatious or abuse of process of court — Rules of Court 2012 O 18 r 19

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This was the first defendant's application pursuant to O 18 r 19 (1)(a) and/or (b) and/or (c) and/or (d) and/or O 15 r 6(2) of the Rules of Court 2012 and/or the inherent jurisdiction of the court to essentially strike out the plaintiff's statement of claim as against the first defendant or further and/or in the alternative that the first defendant ceased to be a party to this action ('the application'). The plaintiff's main claim in this action was against the first and second defendants and based on the plaintiff's pleaded case these claims could be divided to two main parts: (a) payment of the sum of RM1,782,000 as against the first defendant and/or second defendant arising from a loan which the plaintiff claimed was requested by the first and second defendants as evidenced by an agreement entered into between the plaintiff, the first defendant and the second defendant ('the first agreement'); and (b) payment of the sum of RM2m that was held in a fixed deposit account in the fourth defendant's bank which the plaintiff claimed was a loan given by the plaintiff to the second defendant ('the second agreement'). The plaintiff claimed against the first defendant was substantially only in respect of the first agreement and for the sum of RM1,782,000. The first defendant was the holding company of Maju Solar Sdn Bhd ('MSSB'). The second defendant was a subsidiary of MSSB. By way of a letter of award ('the letter of award'), the second defendant was granted by the Energy Commission of Malaysia ('the Energy Commission') a project ('the project'). Thereafter, by way of the Engineering, Procurement, Construction and Commissioning Contract Agreement ('EPCC contract') entered between the plaintiff and the second defendant, the plaintiff was appointed as the EPCC contractor. Pursuant to the letter of award, the second defendant was required to substitute its bid bond with a substitute bond of RM5m ('the substitute bond'). The letter of award further provided that the substitute bond would be returned by the Energy Commission after, inter alia, the issuance of a bank guarantee to the electricity utility company which was to be identified later. In connection to this, the second defendant procured from the first defendant the substitute bond which

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A was then given to the Energy Commission. Pursuant to the EPCC contract, the plaintiff agreed to provide a performance bond by way of bank guarantee in the sum of RM1,782,000 in favour of Tenaga Nasional Bhd ('TNB') on behalf of the second defendant that would serve as the bank guarantee ('TNB bank guarantee'). Following the execution of the first agreement, the first defendant received from the plaintiff the sum of RM1,782,000. The said sum of RM1,782,000 was then utilised to procure the TNB bank guarantee. The TNB bank guarantee was then provided by the second defendant to TNB and the substitute bond was eventually returned to the first defendant. The plaintiff's claim against the first defendant was based upon an allegation of breach of contract in respect of the first agreement and for the relief of lifting the veil of incorporation of the second defendant to make the first defendant liable to pay the plaintiff the sum of RM1,782,000.

Held, allowing the application:

- D (1) The first defendant had not breached the first agreement based on the clear terms thereof, in particular para (b) which put the obligation on the second defendant to pay the RM1,782,000 and not the first defendant. The plaintiff's argument that it would make good commercial and business sense for the first arrangement to be interpreted in a purposive way in that the refund of the loan sum of RM1,782,000 ought to be made from the substitute bond was devoid of merit. Whichever way the first agreement was read, it could not be construed in that way and this would tantamount to adding new terms into the first agreement which was not there and hence against what parties had agreed and intended. There was no understanding that the RM1,782,000 was to be paid from the substituted bond. The plaintiff's pleaded claim pertaining to the breach of the first agreement must fail (see paras 57–60).
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- G (2) The second defendant and the plaintiff were parties in the EPCC contract, not the first defendant. The first defendant's provision of the substitute bond to the Energy Commission was an inter-company arrangement and merely made the first defendant a creditor of the second defendant at the material time. It did not make the first defendant the alter ego of the second defendant. They were separate legal entities. Further and in any event, there was no direct nexus between the second defendant and the first defendant. The fact that the first and second defendants were related companies, share common directors or even if they share common registered and business addresses did not by themselves change the fact that they were separate and distinct legal entities. These commonalities did not automatically make the first defendant the alter ego of the second defendant. Furthermore, the plaintiff did not plead illegality or actual or equitable fraud being the necessary causes of action to give rise to the relief of piercing or lifting the corporate veil (see paras 72–73 & 92).
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- (3) There was no basis or justification for the plaintiff making the first defendant a party to this action. The allegation that the first defendant was the alter ego of the second defendant was unsubstantiated. The plaintiff's pleaded case on lifting of the corporate veil of the second defendant to make the first defendant liable was far from precise let alone clear. The plaintiff had no reasonable cause of action for breach of the first agreement or for lifting the corporate veil against the first defendant and that the plaintiff's claim against the first defendant was frivolous, vexatious or otherwise an abuse of the process of court. That the plaintiff's claim against the first defendant was on the face of it was obviously unsustainable (see paras 97 & 99–100).

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[Bahasa Malaysia summary]

Ini adalah permohonan defendan pertama menurut A 18 k 19(1)(a) dan/atau (b) dan/atau (c) dan/atau (d) dan/atau A 15 k 6(2) Kaedah-Kaedah Mahkamah 2012 dan/atau bidang kuasa sedia ada mahkamah untuk membatalkan pernyataan tuntutan plaintif terhadap defendan pertama atau seterusnya dan/atau sebagai alternatif bahawa defendan pertama tidak lagi menjadi pihak dalam tindakan ini ('permohonan'). Tuntutan utama plaintif dalam tindakan ini adalah terhadap defendan pertama dan kedua dan berdasarkan kes yang dihidkan plaintif tuntutan ini boleh dibahagikan kepada dua bahagian utama: (a) pembayaran jumlah RM1,782,000 oleh defendan pertama dan/atau defendan kedua yang timbul daripada pinjaman yang dituntut oleh plaintif telah diminta oleh defendan pertama dan kedua sebagaimana yang dibuktikan dengan perjanjian yang dibuat antara plaintif, defendan pertama dan defendan kedua ('perjanjian pertama'); dan (b) pembayaran jumlah RM2 juta yang disimpan dalam akaun simpanan tetap di bank defendan keempat yang dituntut oleh plaintif sebagai pinjaman yang diberikan oleh plaintif kepada defendan kedua ('perjanjian kedua'). Tuntutan plaintif terhadap defendan pertama adalah sebahagian besarnya hanya berkenaan dengan perjanjian pertama dan dengan jumlah RM1,782,000. Defendan pertama ialah syarikat induk Maju Solar Sdn Bhd ('MSSB'). Defendan kedua ialah anak syarikat MSSB. Melalui satu surat anugerah ('surat anugerah'), defendan kedua telah diberikan oleh Suruhanjaya Tenaga Malaysia ('Suruhanjaya Tenaga') satu projek ('projek'). Selepas itu, melalui Perjanjian Kontrak Kejuruteraan, Perolehan, Pembinaan dan Pentausahaan ('kontrak EPCC') yang dimeterai antara plaintif dan defendan kedua, plaintif telah dilantik sebagai kontraktor EPCC. Melalui surat award, defendan kedua dikehendaki menggantikan bon bidaan dengan bon pengganti RM5 juta ('bon pengganti'). Surat anugerah selanjutnya memperuntukkan bahawa bon pengganti akan dikembalikan oleh Suruhanjaya Tenaga selepas, antara lain, pengeluaran jaminan bank kepada syarikat utiliti elektrik yang akan dikenal pasti kemudian. Sehubungan dengan ini, defendan kedua memperoleh daripada defendan pertama bon pengganti yang kemudiannya diberikan kepada Suruhanjaya Tenaga. Menurut kontrak EPCC, plaintif bersetuju untuk memberikan bon pelaksanaan melalui

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- A jaminan bank dengan jumlah RM1,782,000 kepada Tenaga Nasional Bhd ('TNB') bagi pihak defendan kedua yang akan menjadi jaminan bank ('jaminan bank TNB'). Berikutan pelaksanaan perjanjian pertama, defendan pertama menerima daripada plaintif sejumlah RM1,782,000. Jumlah
- B RM1,782,000 tersebut kemudiannya digunakan untuk mendapatkan jaminan bank TNB. Jaminan bank TNB kemudiannya diberikan oleh defendan kedua kepada TNB dan bon pengganti akhirnya dikembalikan kepada defendan pertama. Tuntutan plaintif terhadap defendan pertama adalah berdasarkan dakwaan pelanggaran kontrak berkenaan dengan perjanjian pertama dan untuk relif mengangkat tirai pemerbadanan defendan kedua untuk
- C menjadikan defendan pertama bertanggungjawab membayar plaintif sejumlah RM1,782,000.
- (1) Defendan pertama tidak melanggar perjanjian pertama berdasarkan terma jelasnya, khususnya perenggan (b) yang meletakkan kewajipan
- D kepada defendan kedua untuk membayar RM1,782,000 dan bukannya defendan pertama. Hujahan plaintif bahawa adalah munasabah dari segi komersil dan perniagaan untuk pengaturan pertama ditafsirkan dengan
- E cara bertujuan supaya pemulangan wang pinjaman sebanyak RM1,782,000 sepatutnya dibuat daripada bon pengganti adalah tanpa merit. Walau apa pun cara perjanjian pertama dibaca, ia tidak boleh ditafsirkan dengan cara tersebut dan ini sama dengan menambah syarat
- F baharu ke dalam perjanjian pertama yang tiada dan dengan itu bertentangan dengan apa yang telah dipersetujui dan diniatkan oleh pihak-pihak. Tiada persefahaman bahawa RM1,782,000 itu perlu dibayar daripada bon pengganti. Tuntutan yang dihidkan plaintif berkaitan dengan pelanggaran perjanjian pertama harus gagal (lihat perenggan 57–60).
- (2) Defendan kedua dan plaintif adalah pihak dalam kontrak EPCC, bukan defendan pertama. Peruntukan defendan pertama bagi bon pengganti
- G kepada Suruhanjaya Tenaga adalah pengaturan antara syarikat dan hanya menjadikan defendan pertama sebagai pemiutang defendan kedua pada masa itu. Ia tidak menjadikan defendan pertama sebagai alter ego defendan kedua. Mereka adalah entiti undang-undang yang berasingan. Selanjutnya dan dalam apa jua keadaan, tiada hubungan langsung antara
- H defendan kedua dan defendan pertama. Hakikat bahawa defendan pertama dan kedua adalah syarikat berkaitan, berkongsi pengarah yang sama atau walaupun mereka berkongsi alamat berdaftar dan perniagaan biasa tidak dengan sendirinya mengubah fakta bahawa mereka adalah entiti undang-undang yang berasingan dan berbeza. Kesamaan ini tidak
- I secara automatik menjadikan defendan pertama sebagai alter ego defendan kedua. Tambahan pula, plaintif tidak memplid ketidakesahan atau penipuan sebenar atau ekuiti sebagai kausa tindakan untuk menimbulkan relif menembus atau mengangkat tirai pemerbadanan (lihat perenggan 72–73 & 92).

- (3) Tiada asas atau justifikasi untuk plaintif menjadikan defendan pertama sebagai pihak dalam tindakan ini. Dakwaan bahawa defendan pertama adalah alter ego defendan kedua adalah tidak berasas. Kes yang diplidkan plaintif mengenai mengangkat tirai pemerbadanan defendan kedua untuk menjadikan defendan pertama bertanggungjawab adalah jauh dari tepat apatah lagi jelas. Plaintif tidak mempunyai kausa tindakan yang munasabah untuk pelanggaran perjanjian pertama atau untuk mengangkat tirai pemerbadanan terhadap defendan pertama dan bahawa tuntutan plaintif terhadap defendan pertama adalah remeh, menyusahkan atau merupakan penyalahgunaan proses mahkamah. Bahawa tuntutan plaintif terhadap defendan pertama adalah jelas sekali tidak dapat dipertahankan (lihat perenggan 97 & 99–100).]

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Cases referred to

- Appraisal Property Management Sdn Bhd & Ors v Singham Sulaiman Sdn Bhd* [2019] MLJU 1563; [2019] 1 LNS 524, CA (refd) D
- Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, SC (refd)
- Deepak Jaikishan all Jaikishan Rewachand & Anor v Intrared Sdn Bhd (previously known as Reetaj City Centre Sdn Bhd and formerly known as KFH Reetaj Sdn Bhd) & Anor* [2013] 7 MLJ 437; [2012] MLRHU 1182, HC (refd) E
- Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor* [2015] 6 MLJ 449; [2015] 9 CLJ 537, FC (refd)
- Gurbachan Singh s/o Bagawan Singh & Ors v Vellamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeal* [2015] 1 MLJ 773; [2015] 1 CLJ 719, FC (refd) F
- Horace Yao Yee Cheng & Ors v Pearl Oriental Innovation Ltd (formerly known as China Merchants Dichain (Asia) Ltd)* [2010] HKCU 800, CA (refd)
- Law Kam Loy and Anor v Boltex Sdn Bhd and others* [2005] MLJU 225; [2005] 3 CLJ 355, CA (refd) G
- Malaysia Offshore Mobile Production (Labuan) Ltd v PCPP Operating Company Sdn Bhd & Ors* [2018] MLJU 1913; [2018] MLRHU 1662, HC (refd)
- Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 MLJ 309, CA (refd) H
- People's Insurance Co (M) Sdn Bhd v People's Insurance Co Ltd & Ors* [1986] 1 MLJ 68 (refd)
- Perbadanan Kemajuan Negeri Selangor v Selangor Country Club Sdn Bhd* [2017] 2 MLJ 819, CA (refd) I
- Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1, FC (refd)
- Singham Sulaiman Sdn Bhd v Appraisal Property Management Sdn Bhd and another appeal* [2018] MLJU 286; [2018] 1 LNS 277, HC (refd)

- A *Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd)* [2014] 3 MLJ 785, FC (refd)
Tenaga Nasional Bhd v Irham Niaga Sdn Bhd & Anor [2011] 1 MLJ 752, CA (refd)
Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd & other appeals [1996] 1 MLJ 661; [1996] 1 CLJ 393, CA (refd)
- B *United Malayan Banking Corp Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206, FC (refd)
United Malayan Banking Corp Bhd v Datin Theresah bt Abdullah & Anor [1994] MLJU 273; [1994] 2 MLRH 366, HC (refd)
- C *Wang Zhi Yu & Anor v Teo Sung Ngiam & Ors* [2020] MLJU 1042, HC (folld)

Legislation referred to

Rules of Court 2012 O 15 r 6(2), O 18 r 19, O 18 r 19(1)(a), (1)(b), (1)(c), (1)(d)

- D *Dinesh Nandrajog (Nandrajog) for the plaintiff.*
James Khong (James Khong) for the first defendant.
Robert Low (with Karen Yong, Khong Mei Yon and Elaine Koh) (Ranjit Ooi & Robert Low) for the second defendant.
- E *Daphne Khoo (Rahmat Lim & Partners) for the fourth defendant.*

Wan Muhammad Amin JC:

- F [1] This was the first defendant's application pursuant to O 18 r 19(1)(a) and/or (b) and/or (c) and/or (d) and/or O 15 r 6(2) of the Rules of Court 2012 and/or the inherent jurisdiction of the court to essentially strike out the plaintiff's statement of claim dated 17 June 2020 as against the first defendant or further and/or in the alternative that the first defendant cease to be a party to this action ('this application').

G **SALIENT BACKGROUND FACTS**

- H [2] The plaintiff's main claim in this action is against the first and second defendants and based on the plaintiff's pleaded case these claims can be divided to two main parts which are summarised as follows:

- I (a) payment of the sum of RM1,782,000 as against the first defendant and/or second defendant arising from a loan which the plaintiff claims was requested by the first and second defendants as evidenced by an agreement entered into between the plaintiff, the first defendant and the second defendant on 15 November 2019 ('first agreement'); and
- (b) payment of the sum of RM2m that is held in a fixed deposit account in the fourth defendant's bank which the plaintiff claims was a loan given by the plaintiff to the second defendant ('second agreement').

- [3] Apart from its relief on interests and costs the plaintiff claim against the first defendant is substantially only in respect of the first agreement and for the sum of RM1,782,000. A
- [4] Therefore, the facts pertaining to the plaintiff's claim against the other defendants are not material for the purpose of this application. B
- [5] The first defendant is the holding company of Maju Solar Sdn Bhd ('MSSB'). The second defendant is a subsidiary of MSSB. C
- [6] By way of a letter of award dated 23 April 2018 ('letter of award'), the second defendant was granted by the Energy Commission of Malaysia ('Energy Commission') a project known as 'The Development of Large Scale Solar PV (LSSPV) Plant of 9.90Mwa.c. at Gurun, Kedah' ('the project'). D
- [7] Thereafter, by way of the Engineering, Procurement, Construction and Commissioning Contract Agreement dated 1 June 2019 ('EPCC contract') entered between the plaintiff and the second defendant, the plaintiff was appointed as the EPCC contractor. E
- [8] The connection between the parties can thus be summarised as follows:
- (a) the first defendant (the holding company);
 - (b) MSSB (the subsidiary of the first defendant and is not a party to this action); F
 - (c) the second defendant (sub-subsidiary of the first defendant); and
 - (d) the plaintiff (as the EPCC contractor appointed by the second defendantsecond defendant). G
- [9] Pursuant to cl 5 of the letter of award, the second defendant was required to substitute its bid bond with a substitute bond of RM5m ('substitute bond'). H
- [10] Clause 5 of the letter of award further provides that the substitute bond would be returned by the Energy Commission after, inter alia, the issuance of a bank guarantee to the Electricity Utility Company which was to be identified later. I
- [11] In connection to this, the second defendant procured from the first defendant the substitute bond which was then given to the Energy Commission.

- A [12] Pursuant to cl 7.2 of the EPCC contract, the plaintiff agreed to provide a performance bond by way of bank guarantee in the sum of RM1,782,000 in favour of Tenaga Nasional Bhd ('TNB') ('TNB bank guarantee') on behalf of the second defendant. This would serve as the bank guarantee as stated in para 10 above. Clauses 7.2, 7.2.1 to 7.2.3 of the EPCC contract provides as follows:
- B 7.2.1 The Owner is contractually obligated under the PPA Agreement to provide a Performance... Bond of Ringgit Malaysia One Million Seven Hundred Eighty-Two Thousand (*RM1,782,000*) issued by a First-class bank to TNB. for the purpose of security of due performance under the PPA Agreement. The Owner has requested for for *financial assistance* from the EPCC contractor to provide this Performance
- C Bond on behalf and benefit of the *Owner directly to TNB* and EPCC contractor has agreed to provide this Performance based on terms and condition stated herein under the Contract.
- D 7.2.2 The EPCC contractor shall, after the execution of this Agreement and fulfillment of the Conditions Precedents by the Owner, *deliver to TNB the Performance Bond* effective from the date of issue duly-executed by a first class bank reasonably satisfactory to the Owner and the TNB, for the purpose of ensuring foe PPA is valid and enforceable between the Owner and TNB.
- E 7.2.3 The Performance Bond shall remain valid in accordance to PPA's requirement and *shall be returned to EPCC contractor*, if uncalled by TNB within fourteen (14) Business Days after the Scheduled Commercial Operation Date. (Emphasis added.)
- F [13] The 'owner' is defined under the EPCC contract as the second defendant and the plaintiff is referred to therein as the 'EPCC contractor'. The 'PPA agreement' is defined as the agreement between distribution licensee (DL), TNB or SESB and owner or developer for large scale solar (LSS) project via competitive bidding by Energy Commission (EC) in Malaysia.
- G [14] Clause 7.2 of the EPCC contract was varied via the first agreement. Insofar as the TNB bank guarantee is concerned, the first agreement provides, inter alia, as follows:
- H (a) instead of the plaintiff having to provide the TNB bank guarantee, parties agreed that the plaintiff will provide to the second defendant a performance bond in the form of a bank guarantee for RM1,782,000; and
- I (b) pending the provision of the said performance bond to the second defendant, the plaintiff agreed to pay the sum of RM1,782,000 to the first defendant as security for its performance of work pursuant to the EPCC contract.

[15] Upon the first defendant obtaining the release of the substitute bond, the second defendant shall no later than 15 days from the receipt of the substitute bond by the first defendant, pay the sum of RM1,782,000 to the plaintiff. A

[16] Following the execution of the first agreement: B

(a) the first defendant received from the plaintiff the sum of RM1,782,000;

(b) the said sum of RM1,782,000 was then utilised to procure the TNB bank guarantee; C

(c) the TNB bank guarantee was then provided by the second defendant to TNB; and

(d) the substitute bond was eventually returned to the first defendant.

THE FIRST DEFENDANT'S GROUNDS IN SUPPORT OF THIS APPLICATION D

[17] The first defendant's grounds in support of this application is quite straight forward and they can be summarised as follows: E

(a) on a plain reading of the first agreement, it is the second defendant and not the first defendant, that is contractually obligated to pay the sum of RM1,782,000 to the plaintiff. The relevant term in the first agreement is express and unequivocal; F

(b) there is no justification whatsoever for the plaintiff's attempt to transpose the said contractual obligation of the second defendant onto the first defendant; and

(c) the plaintiff's allegation that the first defendant is the alter ego of the second defendant is entirely baseless. G

[18] The material parts of the first agreement being para (b) states as follows:

upon Maju Holdings Sdn Bhd ('MHSB') being the shareholder of MSGSB obtained the release of the commitment bond previously submitted by MHSB from Suruhanjaya Tenaga ('ST Bond'), the Owner shall, no later than 15 days from the date of receipt of the ST Bond, refund the EPCC contractor a sum of RM1,782,000.00, which monies shall be banked into the following account of the EPCC contractor, which the BPCC Contractor will thereafter utilize to procure the Owner Bond to be issued in favour of the Owner in the form as set out in paragraph (a) above within 30 days from the date on which the EPCC contractor has received the refund from the Owner. (Emphasis added.) H I

[19] As the plaintiff's claim hinges upon the terms of this first agreement, a closer examination of its terms will be undertaken later in this judgment.

A THE PLAINTIFF'S PLEADED CAUSE OF ACTION AND RELIEFS
AGAINST THE FIRST DEFENDANT

B [20] Before dealing with the first defendant's grounds in support of this application, it is important to first examine the statement of claim and identify exactly the plaintiff's cause of action against the first defendant.

C [21] Based on its statement of claim the plaintiff has only one cause of action against the first defendant whilst the other is not so much a cause of action but actually a remedy:

- (a) breach of the contract by the first defendant in respect of the first agreement; and
- (b) the lifting of the corporate veil to make the first defendant liable.

D [22] The lifting of the corporate veil is sometimes confused with a cause of action. The lifting of the corporate veil is not in itself a cause of action but is actually a remedy or relief. Hence as I had stated earlier the plaintiff has only one cause of action, the other being a remedy.

E [23] This issue was made clear in the case of *Deepak Jaikishan a/l Jaikishhan Rewachand & Anor v Intrared Sdn Bhd (previously known as Reetaj City Centre Sdn Bhd and formerly known as KFH Reetaj Sdn Bhd) & Anor* [2013] 7 MLJ 437; [2012] MLRHU 1182 where it was held:

F [60] *The doctrine of the lifting of the corporate veil does not form a cause of action in itself.* It appears from the plaintiff's pleadings that the cause of action against Prestige Scale Sdn Bhd is premised on whether the *causes of action pleaded* against Intrared, namely both in *breach of contract and conspiracy* to injure are in fact made out against Intrared. If so, *then the plaintiffs seek the remedy of the lifting of the veil to ensure that they procure the monetary remedy they seek.* The plaintiffs contend that if Intrared is found liable to the plaintiffs under these heads or causes of action, then the 'justice' of the case requires that Prestige Scale Sdn Bhd, as the alter-ego of D2 be also found liable severally for the said sum. I can only conclude so from a perusal of the statement of claim where the plaintiff pleads specifically that: '... the plaintiffs contend that in the event the first defendant is found liable to the plaintiffs for breach as alleged, the justice of the case demands that the second defendant, being the alter ego, same economic entity, agent and/or trustee of the first defendant, also be found liable for the same'. The term 'breach' can only refer to a breach of contract. (Emphasis added.)

I [24] Further, the High Court in *Malaysia Offshore Mobile Production (Labuan) Ltd v PCPP Operating Company Sdn Bhd & Ors* [2018] MLJU 1913; [2018] MLRHU 1662 had referred to *Deepak* and further cited the Hong Kong Court of Appeal case of *Horace Yao Yee Cheng & Ors v Pearl Oriental Innovation Ltd (formerly known as China Merchants Dichain (Asia)*

Ltd) [2010] HKCU 800 as authority that the lifting of the corporate veil is not a cause of action but a remedy.

[25] I now revert to the plaintiff's pleaded case. The plaintiff's statement of claim is quite straight forward, the relevant paragraphs of its statement of claim in respect of the above cause of action for breach of contract and for the remedy of lifting of the corporate veil are reproduced below:

Regarding Breach of Contract — first agreement

11. Defendan Pertama dan Defendan Kedua telah bersetuju dengan Plaintiff bahawa mereka akan membayar balik pinjaman RM1,782,000.00 tersebut kepada Plaintiff dalam masa 15 hari selepas Defendan Pertama menerima balik Substitute/Commitment Bond RM5,000,000.00 tersebut daripada Suruhanjaya Tenaga. Dengan itu, Defendan Pertama, Defendan Kedua dan Plaintiff telah pada 15-11-2019 memasuki suatu perjanjian yang merangkumi persetujuan pihak-pihak ini (selepas ini dikenali sebagai '*Persetujuan Pertama*').

12. Plaintiff telah selanjutnya pada 28-11-2019 memberikan Defendan Pertama jumlah RM1,782,000.00 tersebut yang merupakan Wang Jaminan TNB. Wang Jaminan bernilai RM1,782,000.00 tersebut berikutnya diberikan dalam bentuk Performance Bond kepada TNB (diisukan oleh pihak United Overseas Bank (Malaysia) Bhd pada 2-12- 2019) untuk memenuhi terma-terma Power Purchase Agreement.

13. Lanjutan itu, pada bulan Februari 2020 dan selepas Plaintiff membuat beberapa susulan, Plaintiff telah dimaklumkan oleh Defendan Pertama dan/atau Defendan Kedua bahawa *Suruhanjaya Tenaga pun telah memulangkan Substitute/Commitment Bond berjumlah RM5,000,000.00 tersebut kepada Defendan Pertama dan/atau Defendan Kedua* oleh kerana suatu Performance Bond bernilai RM1,782,000.00 telah dapat diberikan kepada TNB.

14. Walaubagaimanapun, 15 tempoh hari dari tarikh pemulangan Substitute/Commitment Bond tersebut telah luput dan *Defendan Pertama dan/atau Defendan Kedua* telah gagal membayar balik pinjaman RM 1,782,000.00 kepada Plaintiff, seperti yang diperuntukkan di bawah *Persetujuan Pertama*. Plaintiff telah membuat beberapa susulan ke atas isu ini dengan mereka tetapi pihak mereka tidak memberikan jawapan yang memuaskan kepada Plaintiff. (Emphasis added.)

Regarding Lifting of the Veil of Incorporation of the second defendant

Tuntutan plaintiff

25. Plaintiff menegaskan bahawa Defendan Pertama dan Defendan Kedua adalah *syarikat-syarikat berkaitan* dan berusaha sama dalam pembangunan Projek tersebut. Ini adalah jelas daripada fakta mereka berkongsi alamat perniagaan dan alamat berdaftar yang sama serta mempunyai pengarah dan/atau pegawai urusan yang sama/berkaitan.

26. Ianya ditegaskan bahawa *Defendan Pertama merupakan alter-ego kepada Defendan Kedua. Defendan Pertama mempunyai pengawalan ('control') ke atas Defendan Kedua*. Hal ini terbukti daripada penglibatan Defendan Pertama dalam pengendalian bayaran Substitute/Commitment Bond bernilai RM5,000,000.00

- A kepada Suruhanjaya Tenaga serta penglibatannya dalam Persetujuan Pertama.
27. Lebih-lebih lagi, Persetujuan Pertama tersebut telah *ditandatangani oleh orang yang sama* bagi kedua-dua pihak Defendan Pertama dan Defendan Kedua. Oleh itu, *ianya terbukti bahawa Defendan Pertama merupakan alter-ego kepada Defendan Kedua dan Mahkamah yang Mulia seharusnya mengangkat perlindungan korporat ('lift the corporate veil') terhadap Defendan Kedua.* (Emphasis added.)
- B
- [26] The main relief prayed for against the first defendant is as follows:
33. Oleh yang demikian, tuntutan Plaintiff terhadap Defendan-Defendan adalah seperti berikut:
- C
- a) *Defendan Pertama dan/atau Defendan Kedua* membayar sejumlah RM1,782,000.00 kepada Plaintiff yang merupakan jumlah wang yang dihtutangkan di bawah *Persetujuan Pertama.* (Emphasis added.)
- D [27] Therefore, it is exceptionally clear that the plaintiff's claim against the first defendant is based upon an allegation of breach of contract in respect of the first agreement and for the relief of lifting the veil of incorporation of the second defendant to make the first defendant liable to pay the plaintiff the sum of RM1,782,000.
- E
- [28] I shall now examine the first defendant's grounds of this application.
- WHETHER THERE IS AN OBLIGATION UNDER THE FIRST AGREEMENT FOR THE FIRST DEFENDANT TO PAY THE
- F PLAINTIFF RM1,782,000
- [29] First and foremost, the plaintiff's cause of action for breach of contract is based on the first agreement.
- G [30] Secondly, the plaintiff did not plead that there is any ambiguity in the meaning of the first agreement and neither did it do so via its sole affidavit in reply to this application.
- H [31] Thirdly, the first agreement was prepared by the plaintiff and this is evidenced by an email sent by one Celynna Wong from the plaintiff on 5 November 2019 attaching the draft first agreement or then referred to as the 'draft letter on the performance bond' (exh 'D5' of the first defendant's affidavit in reply in encl 73).
- I [32] The first agreement is in a form of a letter from the second defendant to the plaintiff and first defendant respectively. The first defendant and the plaintiff accepted the terms of the first agreement by signing at the Agreement And Acceptance portion of the First Agreement which states as follows:

AGREEMENT AND ACCEPTANCE

A

We hereby agree, accept and be bound by the terms and arrangements set forth in this letter. (Emphasis added)

[33] I will now examine the actual wording of the first agreement, the relevant parts are reproduced below:

B

Dear Sirs,

Engineering, Procurement, Construction and Commissioning Contract Agreement dated 1 June 2019 between Maju Solar (Gurun) Sdn. Bhd. (the 'Owner') and ITRAMAS Technology Sdn. Bhd. (the 'EPCC contractor') ('Contract')

C

—Arrangement in relation to the Performance Bond

We refer to the Contract in particular clause 7.2 where the EPCC contractor is required to procure a performance bond in the form of a bank guarantee amounting to RM1,782,000.00 for and on behalf of the Owner ('Performance Bond') in favour of Tenaga Nasional Bhd ('TNB') as required to be provided by the Owner to TNB in accordance with the terms under the PPA. Notwithstanding the provisions under the Contract, the EPCC contractor and the Owner hereby agree to the following arrangements being the final arrangements in relation to file Performance Bond:

D

a. the EPCC contractor will be required to provide the Owner with a performance bond in the form of a bank guarantee substantially in the form as set out in the Form of Contract for an amount of RM1,782,000.00 ('Owner PB') as security for performance of the Work under the Contract by the EPCC contractor. Pending the provision of the Owner PB by the EPCC contractor to the Owner, we, being the Owner, hereby instruct the EPCC contractor to, no later than 30 November 2019, bank in an amount equivalent to the value of the Owner PB, into the following bank account as security for the performance of file Work by the EPCC contractor:

E

F

Bank Account No.: 8001361283

Bank: CIMB Bank Bhd

Account Holder: Maju Holdings Sdn. Bhd. ('MHSB')

G

b. upon Maju Holdings Sdn Bhd ('MHSB') being the shareholder of MSGSB obtained the release of the commitment bond previously submitted by MHSB from Suruhanjaya Tenaga ('ST Bond'), the Owner shall, no later than 15 days from the date of receipt of the ST Bond, refund the EPCC contractor a sum of RM1,782,000.00, which monies shall be banked into the following account of the EPCC contractor, which the BPCC Contractor will thereafter utilize to procure the Owner Bond to be issued in favour of the Owner in the form as set out in paragraph (a) above within 30 days from the date on which the EPCC contractor has received the refund from the Owner:

H

Bank Account No.: 33000004742

I

Bank: Hong Leong Bank Bhd

Account Holder: ITRAMAS Technology Sdn Bhd

We, the Owner hereby acknowledge and agree that with the payment of the amount

- A equivalent to the value of the Owner PB to MHSB in accordance with *Paragraph (a)* above and the subsequent provision of the Owner Bond to the Owner in accordance with *Paragraph (b)* above, the EPCC contractor shall be deemed to have fully discharged its obligations and satisfied the requirements relating to the Performance Bond under *Clause 7.2 of the EPCC contract*. For the avoidance of doubt, the EPCC
- B contractor is not obliged to issue the Owner Bond in accordance with Paragraph (b) above until and unless the EPCC contractor has received the refund for the sum of RM1,782,000.00 from the Owner and any such non-provision of the Owner Bond due to the EPCC contractor not having received such refund from the Owner shall not in any way be deemed as a failure by die EPCC contractor to fulfil its obligation
- C under Clause 7,2 of the EPCC contract given that the provision of die Owner Bond is solely dependent on the EPCC contractor having received the refund from the Owner.
- Save for the terms agreed under this letter, no other terms under the Contract shall be deemed to have been changed. (Emphasis added.)
- D [34] Based on para (b) of the first agreement it is clear that upon release of the ‘commitment bond’ (the substituted bond) the second defendant is obligated to pay the RM1,782,000 to the plaintiff.
- E [35] There is no ambiguity in the terms of the first agreement and they can be understood from their plain and ordinary or natural meaning.
- F [36] In this regard, the Court of Appeal in *Perbadanan Kemajuan Negeri Selangor v Selangor Country Club Sdn Bhd* [2017] 2 MLJ 819 held as follows:
- G [33] *As a general rule, the words of an instrument must be construed according to their natural meaning.* Where the language of a document is *plain and unambiguous* and applies accurately to existing facts then *the intention of the parties to the document should be gathered from the language of the document itself*. No amount of acting by the parties can alter or qualify words which are plain and unambiguous: see s 94 of the Evidence Act 1950 *North Eastern Rly Co v Lord Hastings* [1900] AC 260 (PC).
- H [34] Accordingly, when a court is called upon to interpret a document, it looks at the language. If the *language is clear and unambiguous* and applies accurately to existing facts, it shall accept the ordinary meaning, for *the duty of the court is not to delve into the intricacies of the human mind to disclose one’s undisclosed intention*, but only to take the meaning of the words used by him, that is to say his expressed intentions: see *Smt Kamala Devi v Seth Takhatmal and another* [1964] AIR 859 a Supreme Court of India decision at p 386. (Emphasis added.)
- I [37] The above passage from the case of *Perbadanan Kemajuan Negeri Selangor* makes it clear that it is not the duty of the court to go beyond the plain and ordinary meaning of the instrument or in the present case the first agreement, where there no ambiguity.

[38] To be clear the plaintiff's claim against the first defendant is for breach of the first agreement and this case be seen from, inter alia, paras 14 and 15 of the statement of claim:

14. Walaubagaimanapun, 15 tempoh hari dari tarikh pemulangan Substitute/Commitment Bond tersebut telah luput dan *Defendan Pertama* dan/atau *Defendan Kedua* telah *gagal membayar balik pinjaman RM 1,782,000.00 kepada Plaintiff, seperti yang diperuntukkan di bawah Persetujuan Pertama*. Plaintiff telah membuat beberapa susulan ke atas isu ini dengan mereka tetapi pihak mereka tidak memberikan jawapan yang memuaskan kepada Plaintiff.

15. Plaintiff telah selanjutnya menulis beberapa surat (termasuk surat-surat bertarikh 9-3-2020, 31-3-2020, 19-5-2020, 10-6-2020 dan 14-6-2020) kepada *Defendan Pertama* dan *Defendan Kedua* atas *isu keberhutangan di bawah Persetujuan Pertama* tetapi mereka masih gagal dan/atau abai dan/atau enggan membuat apa-apa bayaran balik kepada Plaintiff.

28. *Defendan Pertama* dan *Defendan Kedua* telah *gagal dalam obligasinya di bawah Persetujuan Pertama* untuk memastikan pinjaman RM1,782,000.00 dipulangkan kepada Plaintiff walaupun jumlah Substitute/Commitment Bond RM5,000,000.00 telahpun dikembalikan oleh Suruhanjaya Tenaga kepada *Defendan Pertama* dan/atau *Defendan Kedua*. (Emphasis added.)

[39] However, notwithstanding its own pleaded case, in this application the plaintiff is not basing its claim on the terms of the first agreement but what it claims is outside what is stated in the first agreement. This can be seen from the plaintiff's, inter alia, written submissions in encl 83 on the issue of the breach of the first agreement:

14. *Aside from the above facts* which have been specifically *pleaded in the statement of claim* against the First defendant, the plaintiff submits that *vide affidavits exchanged in the course of this proceedings*, the following have also been established:

- (a) The loan monies of RM1,782,000.00 being the Guarantee Sum for TNB were transferred by the plaintiff to D1 (See Exhibit WSG-5 (pages 31-32) of the plaintiff's Affidavit-in-Reply);
- (b) Refund of the loan sum of RM1,782,000.00 *should be made from the RM5,000,000.00 Substitute/Commitment Bond* that was returned by Suruhanjaya Tenaga pursuant to paragraph (b) of the first agreement (see *paragraph 15 of the plaintiff's Affidavit-in-Reply*);
- (c) D1's claim that that it has received the sum of RM5,000,000.00 is misleading because D2 itself in its letter dated 1-4-2020 stated that it has instead received the RM5,000,000.00 Substitute/Commitment Bond and not D1 (See *paragraph 16 of the plaintiff's Affidavit-in-Reply*);
- (d) D1 admitted that it is a creditor of D2 because it provided the RM5,000,000.00 Substitute/Commitment Bond on behalf of D2. This shows that the RM5,000,000.00 Substitute/Commitment Bond is actually D2's monies but it was received by D1 (see *paragraph 17 of the plaintiff's Affidavit-in-Reply*); (Emphasis added.)

A [40] It was further submitted on behalf of the plaintiff in the plaintiff's submissions in reply in encl 89:

(b) It was an understanding between parties that the refund of the loan sum of RM1,782,000.00 would be made from the RM5,000,000.00 Substitute/Commitment Bond (See Exhibit WSG-3 (page 25) of the plaintiff's Affidavit-in-Reply);

B (c) The purpose parties entered into the First Arrangement was to arrange for the refund of the loan sum of RM1,782,000.00 to be made from the RM5,000,000.00 Substitute/Commitment Bond;

C (d) It would make good commercial and business sense for the First Arrangement to be interpreted in a purposive way in that the refund of the loan sum of RM1,782,000.00 ought to be made from the RM5,000,000.00 Substitute/Commitment Bond. (Emphasis added.)

D [41] From the above submissions advanced on behalf of the plaintiff, it is quite clear that:

(a) the plaintiff is relying on facts and issues that were not pleaded in the statement of claim but by way of the exchange of affidavit in this application;

E (b) the argument that there is an understanding between parties that the refund of the RM1,782,000 should be made from the RM5m substitute bond is not within the plaintiff pleaded case; and

F (c) the argument that the first agreement should be interpreted to mean that the refund of the loan sum of RM1,782,000 ought to be made from the RM5m (substituted bond) is also not the plaintiff's pleaded case.

G [42] The above arguments raised by the plaintiff through its affidavit in reply is in effect an attempt to make good a defect or omission in the statement of claim. The plaintiff cannot and should not be allowed to do so and the following cases make this principle clear:

(a) *United Malayan Banking Corp Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206 where Raja Azlan Shah (as he then was) held:

H As we have said earlier the deposit of the shares as security was not disclosed in the statement of claim when the action was instituted nor was the fact that the security had been realised in a series of sales of the shares between January and September 1980, and these matters were only disclosed for the first time in June 1981 in the affidavit in support of the O 14 summons. *This omission is surprising, to say the least, and we cannot but observe that any defect or omission in the statement of claim cannot be made good by affidavit evidence: Gold Ores Reduction Co v Pain* [1892] 2 QB 14 where Mathew J said that:

I it is most important that a defendant should know from the writ what the exact claim against him is. (Emphasis added.)

- (b) the case of *United Malayan Banking Corp Bhd v Datin Theresah bt Abdullah & Anor* [1994] MLJU 273; [1994] 2 MLRH 366 applied the above case of *Palm & Vegetable Oils* and held:

These issues were never pleaded in the statement of defence. It is trite law that parties are bound by their own pleadings. This further affidavit cannot be used as an improved version of the statement of defence: United Malayan Banking Corp Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206, as followed in *Pembinaan V-Jaya Sdn Bhd v Binawisma Development Sdn Bhd* [1987] 1 MLRH 287; [1987] CLJ (Rep) 823. (Emphasis added.)

[43] It appears to be a somewhat common trend for parties, especially when confronted with a summary judgment or a striking out application to attempt to make good an omission or defect in the pleadings or otherwise improve on them through affidavit evidence. Respectfully, I find this trend is unacceptable and should not be encouraged.

[44] In this regard, I must emphasise that in the present case, there were three earlier interlocutory applications filed namely:

- (a) the plaintiff's application for a Mareva injunction (encl 5);
- (b) the plaintiff's application for summary judgment (encl 16); and
- (c) the plaintiff's application for an Erinford injunction (encl 52).

[45] All the above three applications have been disposed.

[46] However, at no point before or after this application was filed did the plaintiff consider it necessary to amend its statement of claim.

[47] That being the case, the plaintiff cannot now be allowed to improve on its claim through its affidavit in reply especially when it had every opportunity to do so.

[48] At this juncture it must highlighted that:

- (a) the plaintiff's pleaded case is for a straight forward breach of contract in that the first defendant had breached the terms of the first agreement by failing to refund the RM1,782,000 to the plaintiff;
- (b) the plaintiff's above claim was based and in reliance on the terms of the first agreement;
- (c) the plaintiff did not plead that there was a departure of the terms of the first agreement where the first defendant would pay the plaintiff the RM1,782,000 or that it would be paid from the substituted bond; and

A (d) the plaintiff did not plead that there was an understanding or agreement that the RM1,782,000 ought to be paid from the substituted bond.

[49] The plaintiff's failure to plead these new alleged facts and issues are fatal to its claim against the first defendant.

B
[50] Be that as it may and despite the plaintiff obvious departure from its pleaded case I had, nevertheless, considered the argument that there was an understanding that the RM1,782,000 was to be paid from the substituted bond and hence I reviewed the plaintiff's email of 1 November 2019 in
C exh 'WSG3' of the plaintiff's affidavit in reply. The email does not contain any agreement between parties but are negotiations which led to exh 'WSG4' of the plaintiff affidavit in reply which is the first agreement (dated 15 November 2019). Bearing in mind the first agreement was prepared by the plaintiff itself which was sent vide its email of 5 November 2019 referred to earlier in this
D judgment.

[51] I pause here to note that it is most inconsistent of the plaintiff to raise this argument because it seeks to contradict the very agreement it is relying on, that is the first agreement.

E
[52] On the issue raised by the plaintiff that the RM1,782,000 was deposited by the plaintiff into the first defendant's bank account, there is nothing untoward about this and is in fact consistent with para (a) of the first agreement. Paragraph (b) of the first agreement then states that it is the second
F defendant (not the first defendant) shall refund the RM1,782,000. These are the clear and express terms of the first agreement and I cannot see how the plaintiff can now try to avoid or circumvent it having pleaded and relied on the first agreement as it is in the statement of claim. This goes against the plaintiff
G own pleaded case.

[53] Learned counsel for the plaintiff, Mr Dinesh Nandrajog, then invited the court to tests the allegations raised (most of which were outside of the plaintiff's pleaded case) at trial.

H
[54] It was submitted, in response thereto, by learned counsel for the first defendant, Mr James Khong, that such an approach is misconceived and that similar arguments were considered in *Wang Zhi Yu & Anor v Teo Sung Ngiao & Ors* [2020] MLJU 1042, where Justice Dato' Ahmad Fairuz bin Zainol Abidin, in striking out the plaintiffs' claim there, held as follows:

[43] Counsel for the plaintiffs highlighted the position of law when courts consider applications under O 18 r 19 of the Rules of Court 2012. This includes the principle that a court should not conduct a minute examination of facts to ascertain whether the plaintiff has a cause of action (see *Tan wei Hong (a minor suing through*

guardian ad litem and next friend Chuang Yin E) & Ors v Malaysia Airlines Bhd and other appeals [2019] 1 MLJ 59). It was also reminded that a complex case ought not be struck out but instead should be tested at trial (see *Sivakumar all Varatharaju Naidu v Ganesan all Retanam* [2011] 6 MLJ 70). Ultimately, according to counsel for the plaintiffs, it was always open to the fourth defendant to plead no case to answer at the end of the trial.

A

B

[44] If this court were to rigidly apply the principle mentioned by counsel, it would mean that even in clear cases such as this current case, this court should not strike out the claim but instead, allow it to proceed to trial as the fourth defendant can be absolved by this court after trial. With respect, if this court were to ignore a case which is obviously unsustainable such as this, it would render the O 18 r 19 merely as an ornamental provision in the Rules of Court 2012.

C

[45] Although the duty of this court at this stage is not to ascertain the merits of the entire case, it never the less bears on this court to consider whether, the factual allegations made by the plaintiffs support the contention as pleaded in the statement of claim. (Emphasis added.)

D

[55] It is easy for a party opposing a striking out application under O 18 r 19 of the Rules of Court 2012 ('the ROC') to invite the court to test the allegations at trial or that something more may turn up when witnesses are called to testify. However, I would agree with Justice Dato' Ahmad Fairuz that this would render the striking out application under O 18 r 19 of the ROC as an ornament provision or otherwise for show or display only.

E

[56] In this regard, I would further add that whilst the discretionary power of the court to dismiss an action summarily under O 18 r 19 of the ROC and under the inherent jurisdiction of the court is a drastic power which should only be exercised in plain and obvious cases (*Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 MLJ 309), however, this does not mean a party opposing a striking out application should take the matter lightly. In fact, it is the opposite. The said opposing party must mount a serious challenge to the striking out application and critically examine whether its pleaded case and the evidence it has to support its pleaded case is sufficient to defeat the application. This would include putting forward its best evidence through its affidavit in opposing the application. In connection to this the Court of Appeal in *Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd & other appeals* [1996] 1 MLJ 661; [1996] 1 CLJ 393, held as follows:

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When a question of law becomes an issue, this in itself will not prevent the court from granting the application, for as long as the court is satisfied that the issue of law is unarguable and unsustainable, it may proceed to determine that question (see *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400.) Likewise, where the affidavit evidence discloses a dispute of facts, such facts must be analysed and if they are found to be inconsistent with undisputed contemporary documents or inherently improbable in themselves, the court is entitled to reject those facts and proceed upon the

I

A *undisputed contemporaneous documentary evidence.* (Emphasis added.)

[57] Reverting back to the issue at hand, I find that based on the plaintiff own pleaded case the first defendant had not breached the first agreement based on the clear terms thereof, in particular para (b) which puts the obligation on the second defendant to pay the RM1,782,000 and not the first defendant.

[58] I further find that learned counsel for the plaintiff's argument that it would make good commercial and business sense for the first arrangement to be interpreted in a purposive way in that the refund of the loan sum of RM1,782,000 ought to be made from the substitute bond is devoid of merit. Whichever way the first agreement is read, it cannot be construed in that way and this would tantamount to adding new terms into the first agreement which is not there and hence against what parties had agreed and intended (*Perbadanan Kemajuan Negeri Selangor*).

[59] I also do not find, based on the plaintiff's argument that there is an understanding that the RM1,782,000 was to be paid from the substituted bond.

[60] On this ground alone, the plaintiff's pleaded claim pertaining to the breach of the first agreement must fail.

LIFTING OF THE CORPORATE VEIL

[61] The following passages from the Hong Kong Court of Appeal case of *Horace Yao Yee Cheng* which was quoted in *Malaysia Offshore Mobile Production (Labuan) Ltd* nicely summarises the requirement before a party can avail itself of the remedy or relief of lifting of the corporate veil:

[38] It has to be observed that *lifting or piercing the corporate veil does not give rise to a cause of action in itself. It is a relief or remedy which can be granted when there is an underlying cause of action. It is therefore, important to determine what the underlying cause of action is.*

[39] In the second place the device of lifting the corporate veil has been said to be a blunt instrument. Whatever a *blunt instrument* might mean in the context, I consider it more appropriate to regard the device of lifting the corporate veil as arbitrary. It is something that must be *carefully applied* and, *in the context of circumstances said to warrant it in this case, it must be clearly established* that the whatever liabilities were incurred the party said to be liable to discharge those liabilities on the basis of lifting the veil had used the party nominally incurring the liability as a facade. That was not the case here. (Emphasis added.)

[62] Therefore, the plaintiff must establish the 'underlying cause of action' in order to enable it to claim for the remedy of lifting the corporate veil. In other

words, and to put it simply the veil of incorporation cannot be lifted or pierced without the necessary cause or causes of action for the remedy to be granted.

A

[63] This necessary cause or causes of action must be in line with the principles laid down in several high authorities on this point of law. Not all causes of action allow the corporate veil to be lifted. However, before I will deal with these causes of action being the prerequisite for the remedy of lifting the corporate veil, the cause of action pleaded by the plaintiff must first be examined in view of this relief.

B

[64] The relevant paras of the statement of claim giving rise to the plea of lifting the corporate veil have been stated earlier in para 25 above which in turn refers to paras 25, 27 and 27 of the statement of claim.

C

[65] The pleaded facts in the statement of claim leading to the relief of lifting the corporate veil can be summarised as follows:

D

- (a) the first and second defendants are related companies in that they both share common registered and business addresses and are both involved in the project;
- (b) the first defendant is the alter ego of the second defendant in that it controls the second defendant. According to the plaintiff, this is purportedly evidenced by:
 - (i) the first defendant making payment of the substitute bond of RM5m to the Energy Commission; and
 - (ii) that the first agreement was signed by the same person on behalf of the first and second defendants.
- (c) that the corporate veil of the second defendant ought to be lifted; and
- (d) the first and second defendant had failed in its obligation under the first agreement to ensure the RM1,782,000 is returned to the plaintiff even though the substituted bond had been returned by the Energy Commission to the first and/or second defendant.

E

F

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[66] It is unescapable that the plaintiff's plea in respect of lifting the corporate veil is based on the underlining cause of action of breach of contract which was covered earlier in this judgment.

[67] Thus, the plaintiff's pleaded case on this point against the first defendant is essentially that arising from the first and second defendant's breach of the first agreement the second defendant's corporate veil ought to be lifted to make the first defendant liable as the first defendant is the alter ego of the second defendant in that the first defendant controls to second defendant.

I

- A [68] Can it be said that the veil of incorporation is so ‘thin’ that it can be pierced so easily? With all due respect to the plaintiff, a breach of contract alone as it had pleaded cannot give rise to the relief of lifting the corporate veil. If this were the case, it would lead to the opening of a huge floodgate of cases which cannot be what the corporate veil was statutorily designed to do or be.
- B [69] This is perhaps the rationale behind the earlier quoted passage from *Horace Yao Yee Cheng* that ‘the device of lifting the corporate veil has been said to be a blunt instrument.
- C [70] This is in addition to the fact that I had already decided that there was no breach of the first agreement by the first defendant based on the plaintiff’s pleaded case.
- D [71] On the issue of alter ego and control or ‘the controlling mind’ behind the second defendant the plaintiff did not plead sufficient particulars on this issue. Further, as stated earlier in para 8 on the salient background facts of this case, the second defendant is the subsidiary of MSSB and MSSB is in turn the subsidiary of the first defendant.
- E [72] It must also be pointed out that it was the second defendant that was awarded the project by the Energy Commission. The second defendant and the plaintiff are parties in the EPCC contract, not the first defendant. The first defendant’s provision of the substitute bond to the Energy Commission was an
- F inter-company arrangement and merely made the first defendant a creditor of the second defendant at the material time. It does not make the first defendant the alter ego of the second defendant. They are separate legal entities. Further and in any event, there is no direct nexus between the second defendant and the first defendant.
- G [73] The fact that first and second defendants are related companies, share common directors or even if they share common registered and business addresses do not by themselves change the fact that they are separate and distinct legal entities (*People’s Insurance Co (M) Sdn Bhd v People’s Insurance Co Ltd & Ors* [1986] 1 MLJ 68 at pp 69–70). These commonalities do not
- H automatically make the first defendant the alter ego of the second defendant.
- I [74] Similarly, whilst the same person, Encik Mohd Faiq Tan Seri Abu Sahid, signed the first agreement for and on behalf of the first defendant and also for the second defendant, it is clear from the first agreement that he did so in different capacities and for different parties. This also, in itself, does not mean the first defendant is the alter ego of the second defendant.
- [75] A case on point is *Tenaga Nasional Bhd v Irham Niaga Sdn Bhd &*

Anor [2011] 1 MLJ 752 where the Court of Appeal in dealing with a similar issue and somewhat similar facts held as follows:

[60] *Even assuming for a moment that TNBT is not in a position to pay for the award, does that mean that the appellant (TNB) being the holding company has to be liable. We just cannot ignore the rule laid down by the Salomon's case. We just cannot throw out Salomon's case out of the window and pretend that it is not there.* We are not prepared to depart from the rule in Salomons case. We are aware of the speech of Lord Denning MR in *Littlewoods Mail Order Stores Ltd v Inland Revenue Commissioners; Same v McGregor (Inspector of Taxes)* [1969] 1 WLR 1241 at p 1254; [1969] 3 All ER 855 at p 860 (CA), where His Lordship said:

The doctrine laid down in *Aron Salomon (Pauper) v A Salomon and Company, Ltd* [1897] AC 22, has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind.

[61] We categorically say that those who have chosen the benefits of incorporation must bear the rigours of the rule in Salomon's case. And *those who deal with a company should likewise be well aware of the rule in Salomon's case.* (Emphasis added.)

[76] In a striking out application under O 18 r 19 of the ROC such as in this present case, the court is mainly concerned with the plaintiff's pleaded case and whether the ingredients that are necessary for the lifting of the corporate veil are present in the statement of claim.

[77] On this issue, the Court of Appeal case in *Irham Niaga* further held as follows:

[48] With respect, *Sunrise Sdn Bhd* and *Yap Sing Hock* can readily be distinguished. The plaintiffs in those two cases clearly had an existing cause of action against the holding company. Here, in the instant appeal, *it is crystal clear that the existing cause of action was against TNBT* — a subsidiary, *but the respondents are now seeking to impose liability on the appellant (TNB) — the holding company, and this is untenable in the circumstances of the case.*

[49] *You cannot simply raise the veil of incorporation just because you feel that it is in the interest of justice. But if there is fraud, then the veil of incorporation may be lifted. But here, there was no fraud at all.*

[50] Paragraph 54 of the respondents' statement of claim at p 74 of the appeal record at Jilid 1 states that the appellant (*TNB*) is the directing mind of *TNBT*. With respect, *that averment is insufficient to trigger the lifting of the veil of incorporation.* And right from the very beginning the respondents said that the appellant (*TNB*) played a prominent role. This cannot be right because the *five agreements were contracts between the respondents and TNBT*. There was thus no veil to be lifted. Everything was there to be seen and appreciated. Nothing was hidden. Everything was transparent. (Emphasis added.)

A [78] Here the plaintiff alleged that the first defendant is the alter ego of the second defendant. That the first defendant controls the second defendant. This conclusion is arrived at by the plaintiff based simply on the first defendant's involvement in providing the substituted bond to the Energy Commission and the first defendant's involvement in the first agreement as well as the commonalities both the first and defendants' share (as stated earlier) as well as the fact that the first agreement was signed by the same person for and on behalf of the first defendant and the second defendant.

C [79] These facts are in themselves insufficient for the corporate veil to be lifted.

[80] There are very specific causes of action which allow the veil of incorporation to be lifted. They involve:

- D (a) fraud at common law; or
(b) some inequitable or unconscionable conduct amounting to fraud in equity.

E [81] This issue was dealt with by the Court of Appeal in in *Law Kam Loy and Anor v Boltex Sdn Bhd and others* [2005] MLJU 225; [2005] 3 CLJ 355 where it was held as follows.

F In my judgment, in the light of the more recent authorities such as *Adams v Cape Industries plc* [1990] Ch 433 it is not open to the courts to disregard the corporate veil purely on the ground that it is in the interests of justice to do so. It is also my respectful view that the special circumstances to which Lord Keith referred include cases where there is actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity. The former, that is to say, actual fraud, was expressly recognised to be an exception to the doctrine of corporate personality by Lord Halsbury in his speech in *Salomon v A Salomon & Co Ltd* [1897] AC 22, the seminal case on the subject. (Emphasis added.)

H [82] *Law Kam Loy* was latter cited with approval by the Federal Court in *Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd)* [2014] 3 MLJ 785:

I [46] We agree with the Court of Appeal that the learned trial judge erred in lifting the corporate veil of the defendant to make the defendant liable to account to the plaintiff. The reason given by the learned trial judge was that it was in the interest of justice to prevent associated companies of Alcatel Group including the defendant from darting in and out with the corporate labyrinth before the court. We also agree with the Court of Appeal that there must be evidence either of actual fraud or some conduct amounting to fraud in equity to justify the lifting of corporate veil. The position of the law on this subject had been clearly stated by Gopal Sri Ram JCA (as he then was) in *Law Kam Loy and Anor v Boltex Sdn Bhd and others* [2005] MLJU 225; [2005] 3 CLJ 355 at p 362 as follows:

In my judgment, in the light of the more recent authorities such as *Adams v Cape Industries Plc*, it is not open to the courts to disregard the corporate veil purely on the ground that it is in the interests of justice to do so. It is also my respectful view that the special circumstances to which Lord Keith referred include cases where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity ... (Emphasis added.)

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B

[83] Learned counsel for the plaintiff had submitted that the phrases or terms, ‘interest of justice’ and ‘special circumstances’ used to in cases involving lifting the corporate veil ought to be construed to include the breach of contract as pleaded by the plaintiff in this action.

C

[84] However, the above-cited cases of *Law Kam Loy* and *Solid Investments* have clearly held that these terms are not open ended and cannot be interpreted without limitation.

D

[85] In this regard, during the hearing of this application learned counsel for the plaintiff conceded that the plaintiff’s claim is *not* based on fraud.

[86] It is also quite clear that neither is the plaintiff’s case based on conspiracy to defraud (*Deepak*) or some inequitable or unconscionable conduct amounting to fraud in equity.

E

[87] The plaintiff’s pleaded case is simply for breach of the first agreement. That because the first and second defendants are related to one another and because they were involved in the first agreement entitles the plaintiff to lift the corporate veil. This is clearly a misconception and the passage quoted earlier from *Irham Niaga* is very apt.

F

G

[88] It cannot be denied that related companies which share common directors or shareholders do transact and conduct business with each other as well as with third parties. This is not uncommon but that does not mean that because of their relationship the veil of incorporation can be automatically lifted when the third party is not able to directly claim against one of those related companies due to privity of contract or where the obligation to pay is with the other related company. There is more to it than that.

H

[89] This was explained at length by the Court of Appeal in *Irham Niaga*, where it was held that even if the subsidiary company was unable to pay the debt, this does not mean the holding or parent company should be made liable. This is similar to what the plaintiff is attempting to do here in the present case, by trying to make the first defendant liable for the RM1,782,000 when it was not its obligation to pay under para (b) of the first agreement.

I

A [90] Learned counsel for the plaintiff also submitted that the special
circumstances to pierce or lift the corporate veil can also include to prevent the
evasion of liability which learned counsel submitted the first defendant is
trying to do. Reference was made to the High Court case of *Singham Sulaiman*
B *Sdn Bhd v Appraisal Property Management Sdn Bhd and another appeal* [2018]
MLJU 286; [2018] 1 LNS 277 where the High Court had examined the
trilogy of Federal Court cases on circumstances where the corporate veil can be
lifted or pierced namely the Federal Court cases of *Solid Investment, Gurbachan*
C *Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf*
and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108,
Mukim Hutan Melintang, Hilir Perak) and other appeal [2015] 1 MLJ
773; [2015] 1 CLJ 719 and *Giga Engineering & Construction Sdn Bhd v Yip*
Chee Seng & Sons Sdn Bhd & Anor [2015] 6 MLJ 449; [2015] 9 CLJ 537
(‘the trilogy of Federal Court cases’).

D [91] However, the High Court’s decision in *Singham* (HC) was overturned
by the Court of Appeal in *Appraisal Property Management Sdn Bhd & Ors v*
Singham Sulaiman Sdn Bhd [2019] MLJU 1563; [2019] 1 LNS 524 in which
the trilogy of Federal Court cases were considered and where it was held as
E follows:

[59] In the present case, it is clear that *the plaintiff has not pleaded illegality as a*
ground for the piercing of the corporate veil. Further, *no case of actual or equitable fraud*
was raised on the pleadings. Therefore, we accept the defendants’ submission that it is not
open to the plaintiff to say that this is a case for piercing the corporate veil. (Emphasis
F added.)

[92] This is precisely the case here, the plaintiff did not plead illegality or
actual or equitable fraud being the necessary causes of action to give rise to the
relief of piercing or lifting the corporate veil. As stated earlier the plaintiff’s
G pleaded case is that the first defendant had breached the first agreement by not
paying the plaintiff the RM1,782,000. However, the plaintiff tried to improve
on its pleaded case by raising other issues that the RM1,782,000 ought to have
been paid from the substituted bond and that this was the understanding of
parties. Even if this was the plaintiff’s pleaded case, it still does not tantamount
H to a cause of action founded on illegality or actual or equitable fraud.

[93] On this issue, *Singham* (COA) applying *Gurbachan Singh* held as
follows:

I [49] In *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors*
(on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot
9108, Mukim Hutan Melintang, Hilir Perak) and other appeal [2015] 1 MLJ
773; [2015] 1 CLJ 719, which was relied by the plaintiff to support its contention
that the learned JC has not erred in lifting the corporate veil, the Federal Court
reiterated the principle that it is trite law that *parties are bound by their pleadings and*

the trial of a suit must confine to the pleadings. The court is not entitled to decide on a matter that has not been pleaded. The Federal Court in that case went on to say:

However, in some instances, evidence adduced during the hearing can overcome the defects in pleadings as long as the other party is not taken by surprise. More so if ‘Such evidence when given without any objection by the opposing party will further have the effect of curing the absence of such plea in the relevant pleading, in other words, the effect of overcoming such defect in the pleading.

[50] However, the facts in *Gurbachan Singh* can be distinguished from the facts of this instant case. In *Gurbachan Singh* case the evidence relating to the issue is whether the third appellant and SPPKB were one and the same entity and whether the first appellant was the alter ego of the fourth appellant *had been given without any objection from the appellants.* However, in this instant case, as we have stated earlier, *the defendants strongly objected to the piercing of the corporate veil.*

[51] It was rightly pointed out by learned counsel for the defendants that *instead of adhering to the pleaded basis for the piercing of the corporate veil*, namely, to assert that the plaintiff has the right to describe itself as being ‘in association with’ Jones Lang LaSalle and/or JLL, *the learned JC pierced the corporate veil of the defendants, inter alia, so as to undertake an investigation whether the defendants were in breach of the then VAEA.* (Emphasis added.)

[94] Similarly, here the plaintiff is attempting to lift the corporate veil by way of an alleged breach of contract.

[95] It is also important to note the first defendant had objected to the plaintiff raising new issues which were not pleaded in the statement of claim.

[96] Further by adding the first defendant as a party to this action, the plaintiff has combined or merged the first defendant with the second defendant into one which is unsupported by the law and evidence and inconsistent with the available evidence. I have dealt with this issue in the earlier part of this judgment.

CONCLUSION

[97] Based on the aforesaid, there is no basis or justification for the plaintiff making the first defendant a party to this action. I would agree with learned counsel for the first defendant that the allegation that the first defendant is the alter ego of the second defendant is unsubstantiated and that:

- (a) no fraud and/or fraud in equity has been pleaded;
- (b) no impropriety has been shown; and
- (c) this is simply not a case where the first defendant is attempting to escape liability to make payment by hiding behind the second defendant. The

A obligation to repay the RM1,728,000 is clearly spelled out in the first agreement and it is not the first defendant that is obligated to do so.

[98] In connection to this, the Court of Appeal in *Singham* (COA) further held:

B [55] It is settled law that the pleadings on piercing the corporate veil *must be precise*, namely on the ground on which it is sought (see: *Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor* [2015] 6 MLJ 449; [2015] 9 CLJ 537). (Emphasis added.)

C [99] With respect, I find the plaintiff's pleaded case on lifting of the corporate veil of the second defendant to make the first defendant liable is far from precise let alone clear. In colloquial terms, it essentially tried to bind the first and second defendant together without a string or rope to tie them. Thus, it is a mere conjecture.

D [100] In the circumstances I find that the plaintiff has no reasonable cause of action for breach of the first agreement or for lifting the corporate veil against the first defendant and that the plaintiff's claim against the first defendant is frivolous, vexatious or otherwise an abuse of the process of court. That the plaintiff's claim against the first defendant is on the face of it is obviously unsustainable (*Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1; *Bandar Builder Sdn Bhd v United Malaysian Banking Corp Bhd* [1993] 3 MLJ 36).

F [101] For the reasons stated above, I allowed this application and after hearing both counsel's arguments on costs, awarded costs of RM7,500 in favour of the first defendant.

G *Application allowed.*

Reported by Nabilah Syahida Abdullah Salleh

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